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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

LUTHER R. CAMPBELL, a/k/a LUKE SKYYWALKER;
CHRISTOPHER WONGWON, a/k/a FRESH KID ICE;
MARK ROSS, a/k/a BROTHER MARQUIS;
DAVID HOBBS, a/k/a MR. MIXX;
professionally known as THE 2 LIVE CREW;
LUKE SKYYWALKER RECORDS,
Petitioners,

v.

ACUFF-ROSE MUSIC, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICUS CURIAE WARNER BROS., A DIVISION OF TIME WARNER ENTERTAINMENT COMPANY, L.P., IN SUPPORT OF NEITHER PARTY

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INTEREST OF AMICUS

Amicus Warner Bros. engages in the production and distribution of motion pictures for exhibition in theatres and, over television and by means of videocassettes, in the home. These activities are, almost without exception, done on a commercial basis. The varied content of the motion pictures released by Warner Bros. includes romances, mysteries, thrillers, westerns, musicals, science fiction, and indeed, every topic and approach which can be developed by the ingenuity of motion picture creators.

Warner Bros. has a significant interest in the outcome of this case. As a major creator of copyrighted works, Warner Bros. supports a strong regime of copyright protection. Warner Bros. accordingly believes that fair uses of copyrighted material should be limited, and that such uses should not diminish the market for the original works.

As both a copyright owner and a fair user of copyrighted material, however, Warner Bros. is concerned with preserving the equitable balance that the fair use doctrine aims to achieve between proprietary interests of creators and the public interest in use and dissemination of expression. The case-by-case weighing of competing concerns that is inherent in and required by such an equitable doctrine is threatened by the Sixth Circuit's adoption in this case of a rigid presumption against commercial use of copyrighted material.

SUMMARY OF ARGUMENT

In *Sony Corp.* v. *Universal City Studios*, 464 U.S. 417, 449 (1984), the Court stated as dictum that the nontransformative copying of copyrighted television programming would be presumptively unfair if done "for a commercial or profit-making purpose." In concluding that private, noncommercial home videotaping of over-the-air broadcasts for purposes of time-shifting constitutes a fair

use, the Court stated that "although every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of a copyright, noncommercial uses are a different matter." *Id.* at 451.

The Court's dictum in *Sony* concerning commercial uses has, in the lower federal courts, taken on a life of its own and a meaning wholly divorced from the limited context in which it was enunciated. Perhaps searching to avoid the case-by-case balancing required by the statute, some courts, including the Court of Appeals for the Sixth Circuit in the decision below, have misguidedly and almost talismanically incanted an unworkable and elusive presumption against commercial use that has no basis in the copyright statute, legal precedent, or legislative history.

The commercial or noncommercial character of a use is, of course, relevant to the fair use inquiry, as is the socially productive versus nonproductive character of a use. The Court should clarify, however, that no presumption attaches to the commercial consideration itself—with respect to either the first statutory fair use factor, "the purpose and character of the use," or the fourth statutory factor, "the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107. The court below erred in attaching presumptive weight to the commercial nature of petitioners' use and in thereby summarily concluding, without further analysis, that both the first and fourth statutory factors weighed against a finding of fair use. Accordingly, the decision below should be vacated and the matter reconsidered in light of an appropriate fair use standard as supported herein.[1]

---

[1] *Amicus* takes no position with respect to whether the use at issue in this case constitutes a parody and, if so, whether such a use constitutes a fair use.

ARGUMENT

THE LOWER COURT ERRED IN ADOPTING A PRESUMPTION THAT COMMERCIAL USE OF COPYRIGHTED MATERIAL IS UNFAIR

In the decision below, the Court of Appeals for the Sixth Circuit stated that it must "start from the position" that a use is unfair if it is commercial. *Acuff-Rose Music, Inc.* v. *Campbell*, 972 F.2d 1429, 1437 (CA6 1992). It based this analysis on its characterization of the Court's dictum in *Sony* that "[t]he use of a copyrighted work primarily for commercial purposes . . . [is] presumptively unfair." *Id.* at 1436. The Court of Appeals then applied its essentially irrebuttable presumption in such a manner as to conclude not only that the first factor weighed against a finding of fair use, but also that the fourth factor—the effect on the market value of the copyrighted work—weighed against fair use. *See id.* at 1438 ("In the instant case, the use of the copyrighted work is wholly commercial, so that we presume that a likelihood of future harm to Acuff-Rose exists.").

In so doing, the court below made the inquiries under the first and fourth statutory factors coextensive with the determination of whether the nature of a use is commercial. It ignored other considerations that shape the purpose and character of a use, such as whether the allegedly infringing use builds or comments on the copyrighted material and thus is socially productive or transformative, or whether the user acted in good faith. The Court also dispensed with any attempt to analyze whether or how the transformative use might have diminished the market value of the copyrighted work.

Simply by labelling the work "commercial," therefore, the Court of Appeals dismissed two of the four statutory elements of the fair use defense. Because the Court has held that the fourth factor "is undoubtedly the single most important element of fair use," *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 471 U.S. 539, 566 (1985), the Sixth Circuit's presumption against commercial use effectively eviscerated more than half of the elements of the fair use defense. This primacy placed upon the commercial nature of the use is contrary to the copyright statute and unsupported by precedent, and constitutes an unworkable legal standard.

I. The Copyright Act Provides That The Commercial Character Of A Use Constitutes Only One Of Many Considerations Governing Application Of The First Fair Use Factor

The Copyright Act of 1976 (the "Act" or "Copyright Act") codified the judicially-created doctrine of fair use. *See Harper & Row*, 471 U.S. at 549. Section 107 of that Act, as amended in 1992, provides in part:

> In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.
>
> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

17 U.S.C. § 107.

It is elementary that when construing the scope of copyright protection afforded creators, the language of

the Copyright Act is the starting point for analysis. *See, e.g., Mills Music, Inc.* v. *Snyder*, 469 U.S. 153, 164 (1985) ("In construing a federal statute, . . . [we] therefore start with an examination of the statutory text."); *see also Sony Corp.* v. *Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) ("[I]t is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product."); *id.* at 431 ("[T]he protection given to copyrights is wholly statutory.").

The Court of Appeals' decision is contrary to the statutory language governing fair use. Section 107 states that courts should consider "whether such use is of a commercial nature or is for nonprofit educational purposes" when weighing the first statutory fair use factor, "the purpose and character of the use." 17 U.S.C. § 107(1). However, by providing that the determination of the first factor shall "includ[e]" consideration of whether the use is commercial or educational, the statute is clear on its face that the commercial nature is not in itself dispositive of the purpose and character of the use. *See* 17 U.S.C. § 101 (defining "including" and "such as" as "illustrative and not limitative"). Moreover, the statute in no way suggests—much less provides—that the commercial nature is determinative of the fourth statutory fair use factor, the effect of the use on the market value of the copyrighted work.

The broad, non-exclusive statutory language governing the effect to be given a commercial use is consistent with congressional intent. In codifying the fair use defense, Congress

> amended the first of the criteria to be considered—"the purpose and character of the use"—to state explicitly that this factor includes a consideration of "whether such use is of a commercial nature or is for non-profit educational purposes." This amendment is not intended to be interpreted as any sort of not-for-profit limitation on educational uses of copyrighted works. It is an express recognition that, as under the present law, *the commercial or non-profit character of an activity, while not conclusive with respect to fair use, can and should be weighed along with other factors in fair use decisions.*

H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. at 66 (1976) (emphasis added). Giving presumptive weight to the commercial nature of a use therefore contravenes the express non-exclusive language of the statute and the congressional purpose underlying it.

The structure and language of the entire fair use provision, in fact, preclude a presumption that undermines the case-specific nature of the defense. The four statutory fair use factors are themselves non-exclusive, *see* 17 U.S.C. § 107 ("In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall *include* . . . ." (emphasis added)) —as are the specified examples of the kinds of purposes for which a use of copyrighted material might be deemed fair. *See id.* ("[T]he fair use of a copyrighted work, *including* such use by reproduction in copies or phonorecords . . . , for purposes *such as* criticism, comment, news reporting, teaching . . . , scholarship, or research, is not an infringement of copyright." (emphasis added)).

Such explicitly nonpresumptive, non-exclusive language is consistent with Congress' intent in codifying the fair use defense. Congress expressly recognized that "the endless variety of situations and combinations of circumstances that can rise in particular cases precludes the formulation of exact rules in the statute." H.R. Rep. No. 94-1476, *supra*, at 66. Accordingly, Congress "endorse[d] the purpose and general scope of the judicial doctrine of fair use" while maintaining that "the courts must be free to adapt the doctrine to particular situations on a case-by-case basis." *Id.; see also* S. Rep. No. 94-473, 94th Cong., 1st Sess. at 62 (1975); *accord* H.R. Rep. No.

102-836, 102d Cong., 2d Sess. at 3 (1992) ("All claims of fair use must be judged on the totality of the facts in the particular case by balancing all the factors."); *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 471 U.S. 539, 561 (1985) ("The drafters resisted pressures from special interest groups to create presumptive categories of fair use, but structured the provision as an affirmative defense requiring a case-by-case analysis.").

Congress reinforced its commitment to a nonrigid doctrine when it amended Section 107 last year by adding the following: "The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors." P.L. 102-492 (Oct. 27, 1992). In so amending the statute, Congress made clear that there should "be no per se rule barring claims of fair use" and that it did not intend "to direct the courts how much weight to give to any factor in a particular case." H.R. Rep. No. 102-836, *supra*, at 1; *see also id.* at 2 ("The goal of [the legislation] is to direct the courts to strike the correct balance on the facts before it, free from any *per se* rules."). Instead, "courts are to determine the affirmative defense of fair use . . . on a case-by-case basis" and "to give proper weight to all factors." *Id.* at 1.

A presumption that commercial uses are unfair therefore not only lacks support in the Copyright Act; it actually contravenes the express statutory language. By explicitly maintaining a case-by-case, equitable view of fair use, Congress rejected any attempt to presume certain categories of uses of copyrighted material to be unfair.

II. The Court's Precedents Do Not Support A Presumption That Commercial Uses Are Unfair

The Sixth Circuit's emphasis on the commercial nature of a use distorts the Court's dictum in *Sony*. The Court of Appeals improperly interpreted *Sony* as formulating

a universally applicable, judicially-created presumption which departs from the literal words of the statute. To interpret *Sony* as adopting a presumption against commercial uses that would make the fair use defense less available would be to elevate the Court's dictum above its holding.

So elevating the Court's dictum would mean ignoring the bulk of the Court's opinion that affirmed the fact-specific nature of the fair use defense. The Court in *Sony* explicitly and repeatedly noted that the fair use doctrine constitutes an " 'equitable rule of reason,' " 464 U.S. at 448, 454, and cited at length the legislative history stating that the defense is highly case-specific rather than governed simply by the commercial/noncommercial determination. *See id.* at 448-49 nn.31-32.

The Court even rejected the lower court's attempt to adopt a presumption against nonproductive uses, because it was unwilling to "rigidly circumscribe[]" the "sensitive balancing of interests" required in the fair use analysis. *Id.* at 455 n.40. Rather, the Court explicitly stated that "[t]he distinction between 'productive' and 'unproductive' uses may be helpful in calibrating the balance," *id.*, thus effectively rejecting the possibility that *any* aspect of "the purpose and character of the use" is presumptively dispositive of the first factor. Given the facts and circumstances of that case, therefore, *Sony* should not be interpreted as adopting through dictum a generally applicable presumption that commercial uses are unfair. *See also Harper & Row*, 471 U.S. at 597 (Brenan, J., dissenting) (stating that the Court in *Sony* held "that the fair use inquiry could never be resolved on the basis of . . . a 'two dimensional' categorical approach").

Any question as to the meaning of the Court's dictum regarding commercial uses in *Sony* was definitively resolved in *Harper & Row*. The Court reaffirmed that presumptive categories are to be avoided in the fair use inquiry. *See* 471 U.S. at 561. It also refused to confine

analysis of the first statutory fair use factor to the commercial versus noncommercial character of the use. *See id.* at 562-63. Likewise, in determining the fourth fair use factor—the effect on the market—the Court in no way attached any presumptive weight to the commercial value obtained by the infringer through the use of copyrighted material. *See id.* at 566-69. Accordingly, the Court of Appeals for the Sixth Circuit erred in this case in relying upon this Court's dictum in *Sony* to support a presumption against commercial use. There is no basis in this Court's precedent for such a presumption which directly contravenes the language and intention of the Copyright Act.

III. A Presumption That Commercial Uses Are Unfair Is Unworkable And Of No Determinative Value

Not only is there no statutory or judicial support for a presumption against commercial use, but such a presumption should be rejected as unworkable. The statutory distinction between uses of a commercial nature and uses of a nonprofit educational purpose

> somewhat unrealistically paints the world into two corners—the venal commercial and the altruistic instructive. In fact, publishers of educational textbooks are as profit-motivated as publishers of scandal-mongering tabloid newspapers. And a serious scholar should not be despised and denied the law's protection because he hopes to earn a living through his scholarship. *The protection of the statute should not turn on sackcloth and missionary zeal. It rather directs the court to make an appraisal of social usefulness and of commercial fair play.*

Salinger v. *Random House, Inc.*, 650 F. Supp. 413, 425 (SDNY 1986) (emphasis added), *rev'd on other grounds*, 811 F.2d 90 (CA2 1987), *cert. denied*, 484 U.S. 890 (1988).

In practice, virtually all litigated uses of copyrighted material are of a commercial nature. The presumption

against commercial use, if literally applied, thus eviscerates the fair use defense. Indeed, when governed by such a "presumption," courts attempt to mitigate its harsh consequences by reintroducing equitable considerations in classifying the use as commercial or noncommercial. The presumption thus serves as little more than an impetus for courts selectively to invoke legal fictions to escape findings of unfair use. The results are anomalous and unpredictable. *See, e.g., Hustler Magazine, Inc.* v. *Moral Majority, Inc.*, 606 F. Supp. 1526, 1534 (CD Cal 1985) (religious fundamentalist group's use of ad parodying Rev. Jerry Falwell in mass mailing to group members was not commercial "merely because Reverend Falwell's use came in the course of an appeal for donations"), *aff'd on other grounds*, 796 F.2d 1148, 1152 (CA9 1986) (use of ad was of commercial nature because "defendants distributed copies of the parody as an integral part of a financial appeal"); *see also Narell* v. *Freeman*, 872 F.2d 907, 913-14 (CA9 1989) (romance novelist's use of historical work constituted fair use, even though presumption against commercial use weighed against first and fourth factors).[2]

---

[2] Although other courts have, like the Court of Appeals below, accorded undue weight to the dictum in *Sony*, it is noteworthy that even these other courts have not applied a presumption against commercial use in nearly so determinative or irrebuttable a fashion as did the court below. The district court in *Hustler* v. *Moral Majority*, for example, noted that "[e]ven if Falwell's use had been purely commercial, the court would conclude that the presumption of unfairness had been rebutted in this case." 606 F. Supp. at 1534-35. Central to this statement seemed to be the court's consideration of the socially productive or transformative nature of the use. The court noted that Falwell's use did not serve the same purpose as the original advertisement, but rather "meant to provoke the anger of his followers and to comment on the level of obscenity in the work." *Id.* at 1535, *aff'd*, 796 F.2d at 1152 ("Even assuming that the use had a purely commercial purpose, the presumption of unfairness can be rebutted by the characteristics of the use.").

Similarly, the Court of Appeals in *Narell* v. *Freeman* noted that even though the commercial nature of a use was presumptive as to

The Court of Appeals for the Second Circuit has rejected the presumption against commercial use that some courts have inferred from the Court's dictum in *Sony*, perhaps recognizing that the classification of a use as primarily commercial or noncommercial is inherently malleable and standardless. *Compare Iowa State University* v. *American Broadcasting Co.*, 621 F.2d 57, 61 (CA2 1980) (network's use, in telecast about gold-medal winner, of clips from student-produced film biography of a fellow student athlete and his quest for excellence was of a commercial nature because it "was not motivated solely by . . . beneficence"), *with Consumers Union of United States, Inc.* v. *General Signal Corp.*, 724 F.2d 1044, 1049 (CA2 1983) (use in advertising of copyrighted material from *Consumer Reports* praising company's vacuum cleaners held to "serve the important function of educating the public"), *cert. denied*, 469 U.S. 823 (1984).

The Second Circuit instead has held that *Sony* did not "alter[] the traditional multi-factor fair use inquiry," *Maxtone-Graham* v. *Burtchaell*, 803 F.2d 1253, 1262 (CA2 1986), *cert. denied*, 481 U.S. 1059 (1987), in which the commercial nature of the use has no more weight than the socially productive or transformative nature of the use. *See Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F.2d 303, 307-09 (CA2 1966), *cert. denied*, 385 U.S. 1009 (1967); *see also Weissman*

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the first factor, "[t]his court does consider the scope of fair use expanded (but not determinatively) if the original and copy do not serve the 'same intrinsic purpose.'" 872 F.2d at 914. Moreover, although "the likelihood of future harm" could "be presumed" by the defendant's use of the copyrighted material, the court held that the fourth factor weighed in favor of the infringer, because "[t]he works are directed to fundamentally different purposes." *Id.*

Accordingly, although many "courts ritualistically proclaim, almost as a mantra, that every commercial use is 'presumptively' unfair, that presumption is easily overcome by a transformative, nonsuperseding use." *American Geophysical Union* v. *Texaco, Inc.*, 802 F. Supp. 1, 13 (SDNY 1992).

v. *Freeman*, 868 F.2d 1313, 1324 (CA2 1989) (evaluating, for purposes of the first fair use factor, both whether the alleged infringer gained from the use, and whether the use was productive or for the same intrinsic purpose as the copied work), *cert. denied*, 493 U.S. 883 (1989); *accord Sega Enterprises Ltd.* v. *Accolade, Inc.*, 977 F.2d 1510, 1523 (CA9 1992) ("[W]e are free to consider the public benefit resulting from a particular use notwithstanding the fact that the alleged infringer may gain commercially."); *American Geophysical Union* v. *Texaco, Inc.*, 802 F. Supp. 1, 12 (SDNY 1992) ("The *Sony* holding did not overturn the preexisting concept that productive or transformative uses were favored over non-productive, merely superseding copies.").[3]

This Court should approve the reasoning of the Second Circuit in rejecting the presumption against commercial use as both unworkable and contrary to the Copyright Act and the Court's precedent. The Court should reaffirm the equitable nature of the fair use doctrine, thereby ensuring that the commercial nature of a use does not, as it did below, impermissibly negate two of the four statutory factors constituting a fair use defense.

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[3] Even prior to *Sony*, it was well established that Section 107 of the Copyright Act "makes commercial motive relevant to fair use analysis. But it is certainly not decisive." *Triangle Publications, Inc.* v. *Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1175 (CA5 1980); *accord Pacific and Southern Co.* v. *Duncan*, 744 F.2d 1490, 1496 (CA11 1984) (post-*Sony* decision citing *Triangle* and looking to non-transformative as well as commercial nature of use in finding no fair use), *cert. denied*, 471 U.S. 1004 (1985).

CONCLUSION

For the reasons stated above, the Court should vacate the decision of the Court of Appeals for the Sixth Circuit and reconsider the matter in light of the legal fair use standard supported herein.

Respectfully submitted,

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